



March 21, 2001

Mr. Eric G. Calhoun
Lawson & Fields, P.C.
5323 Spring Valley Road, Suite 300
Dallas, Texas 75240

OR2001-1137

Dear Mr. Calhoun:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 145227.

The Houston Police Officers Pension System (the “system”), which you represent, received two requests for “any and all invoices for legal fees, filing fees, duplication costs, deposition costs, legal research and any other expenses submitted for reimbursement” sent to the system by law firms representing the system in two cases. The requestor questions the system’s compliance with the Public Information Act’s (“PIA”) procedures. You claim that the requested information is excepted from disclosure under sections 552.107 and 552.111 of the Government Code. We have considered the exceptions you claim and the requestor’s remarks and reviewed the submitted information.

We begin with the requestor’s concern that the system has not complied with the PIA’s procedural requirements. Subsections 552.301(a) and (b) of the Government Code provide:

(a) A governmental body that receives a written request for information that it wishes to withhold from public disclosure and that it considers to be within one of the [PIA’s] exceptions . . . must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions.

- (b) The governmental body must ask for the attorney general's decision and state the exceptions that apply within a reasonable time but not later than the 10th *business* day after the date of receiving the written request.

Gov't Code, § 552.301(a)(b) (emphasis added). The system received the requests for information from the requestor on January 2, 2001. On January 17, 2001, our office received the system's letter asking for an attorney general's decision. This office received this letter on the 10th business day following your receipt of the requests for information. Therefore, regarding these two requests for information, the system has complied with section 552.301(b) of the Government Code.

Subsection 552.301(d) of the Government Code provides as follows:

. . . .

- (d) A governmental body that requests an attorney general decision under Subsection (a) must provide to the requestor within a reasonable time but not later than the 10th business day after the date of receiving the requestor's written request:

- (1) a written statement that the governmental body wishes to withhold the requested information and has asked for a decision from the attorney general about whether the information is within an exception to public disclosure; and
- (2) a copy of the governmental body's written communication to the attorney general asking for the decision or, if the governmental body's written communication to the attorney general discloses the requested information, a redacted copy of that written communication.

Gov't Code § 552.301(d). The requestor does not contend that he did not receive a copy of the system's section 552.301(d)(2) correspondence to this office asking for a decision. In our opinion, by forwarding a copy of the section 552.301(d)(2) correspondence to the requestor, the system has substantially complied with both provisions of section 552.301(d).

Attorney fee bills, such as those at issue here, are subject to section 552.022(a) of the Government Code, which provides in pertinent part as follows:

- (a) Without limiting the amount or kind of information that is public information under this chapter, the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:

....

(16) information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege.

Gov't Code § 552.022(a)(16). Under section 552.022, fee bills must be released unless they are expressly confidential under other law. Section 552.107 of the Government Code, which excepts information within the attorney-client privilege, is a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 630 at 4 (1994) (governmental body may waive section 552.107(1)). However, the attorney-client privilege is also found in Rule 503 of the Texas Rules of Evidence. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 503.

Rule 503(b)(1) provides:

A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:

- (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (B) between the lawyer and the lawyer's representative;
- (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (D) between representatives of the client or between the client and a representative of the client; or
- (E) among lawyers and their representatives representing the same client.

Tex. R. Evid. 503(b)(1). A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication. *See* Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503, provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ); *see also* Tex. R. Evid. 511 (waiver of privilege by voluntary disclosure).

After reviewing your arguments and the attorney billing statements submitted to this office, we believe that you have demonstrated that some of the entries contained therein constitute confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Where a document contains confidential attorney-client communications, the privilege attaches to the entire document, not just to specific portions relating to legal advice, opinions or mental analysis. *See Pittsburgh Corning*.¹ However, if the system chooses to waive the privilege, it need not withhold the entire document. *See* Tex. R. Evid. 511(1). We have marked the billing statement documents that the system may withhold from disclosure in their entirety pursuant to Rule 503.

Section 552.111 of the Government Code, which excepts information within the attorney work product privilege, is also a discretionary exception under the Public Information Act and does not constitute "other law" for purposes of section 552.022. *See* Open Records Decision No. 473 (1987) (governmental body may waive section 552.111). However, the attorney work product privilege is also found in Rule 192.5 of the Texas Rules of Civil Procedure. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, No. 00-0453, 2001 WL 123933, at *8 (Tex. Feb. 15, 2001). Thus, we will determine whether the information is confidential under Rule 192.5.

An attorney's core work product is confidential under Rule 192.5. Core work product is defined as the work product of an attorney or an attorney's representative developed in anticipation of litigation or for trial that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* Tex. R.

¹ We have no information to establish the applicability of an exception to the attorney-client privilege in this case. *See* Tex. R. Evid. 503(d).

Civ. P. 192.5(a), (b)(1). Accordingly, in order to withhold attorney core work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material was 1) created for trial or in anticipation of litigation and 2) consists of an attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *Id.* The first prong of the work product test, which requires a governmental body to show that the information at issue was created in anticipation of litigation, has two parts. A governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v. Brotherton*, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. The second prong of the work product test requires the governmental body to show that the documents at issue contain the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories. *See* Tex. R. Civ. P. 192.5(b)(1). A document containing core work product information that meets both prongs of the work product test is confidential under Rule 192.5, provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *See Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.-Houston [14th Dist.] 1993, no writ).

After reviewing your arguments and the attorney billing statements submitted to this office, we believe that you have demonstrated that some of the entries contained therein constitute attorney core work product. We have marked the billing statement documents that the system may withhold pursuant to Rule 192.5. With the exception of the information we have marked pursuant to Rule 192.5 and Rule 503, you must provide the requestor with the information submitted to us for review pursuant to section 552.022(a)(16) of the Government Code.

In summary, we find that you have complied with the procedural requirements of section 552.301 of the Government Code. Some of the attorney fee bill entries contain confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Thus, where those entries are marked, you may withhold the entire document from disclosure pursuant to Rule 503 of the Texas Rules of Evidence. Some of the attorney fee bill entries also contain attorney core work product. Thus, where those entries are marked, you may withhold the entire document from disclosure pursuant to Rule 192.5 of the Texas Rules of Civil Procedure. With the exception of the information we have marked pursuant to Rule 503 and Rule 192.5, you must release the information to the requestor based on section 552.022(a)(16) of the Government Code.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

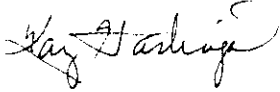
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for

contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in cursive script, appearing to read "Kay H. Hastings".

Kay H. Hastings
Assistant Attorney General
Open Records Division

KHH/RJB/seg

Ref: ID# 145227

Encl. Marked documents

cc: Mr. Robert J. Thomas
General Counsel
Houston Police Officers' Union
1818 Memorial Way, Suite 201
Houston, Texas 77007
(w/o enclosures)